

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 26, 2009 Session

ALLEN RAY WOLFE v. MAYES MORTUARY

**Direct Appeal from the Circuit Court for Hamblen County
No. 07CV016 Kindall Lawson, Judge**

No. E2009-00406-WC-R3-WC - Filed February 17, 2010

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee alleged that he injured his back in the course of his employment. Employer denied liability, asserting that Employee had not complied with the notice requirements of the workers' compensation law. Tenn. Code Ann. § 50-6-201. The trial court found that Employee gave sufficient notice, and awarded one hundred fifty-six weeks of permanent partial disability benefits. Employer has appealed, arguing that the trial court erred by finding that Employee provided notice of his injury, and also that the award is excessive. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Affirmed

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which SHARON G. LEE, J., and D. KELLY THOMAS, JR., SP. J., joined.

Steven L. Williams, Knoxville, Tennessee, for the appellant, Mayes Mortuary.

James M. Davis, Morristown, Tennessee, for the appellee, Allen Ray Wolfe.

MEMORANDUM OPINION

Factual and Procedural Background

Allen Ray Wolfe ("Employee") was an assistant funeral director for Mayes Mortuary

("Employer"). He alleged that he injured his lower back on an unspecified date in the summer of 2006 while moving a corpse. He testified that he did not know the date upon which the injury occurred. He believed that it happened in May or June of 2006. He was, however, able to provide some details concerning the incident. He stated that he was working with another employee, Jack Fleemon. When the injury occurred, the hallway in the home where the body was located was narrow and it was necessary for them to move the body in an upright position for some distance. Mr. Fleemon had recently had heart surgery, and was not able to lift or carry a large weight. Therefore, Employee held the body up by himself. As he was holding the body, the weight shifted. He felt a popping sensation and immediate pain in his lower back. He testified that he informed his supervisor, Ron McClellan, of the incident later that day, and that McClellan did nothing in response.

Mr. Fleemon testified at the trial. He confirmed that Employee told him that he had injured his back at the time it occurred. His description of the event matched Employee's. Mr. Fleemon added that the incident occurred at a house on Carroll Road in Hamblen County. However, he was also unable to identify the week or month when the incident occurred. He also testified that, on the date of the injury, he heard Employee tell Mr. McClellan that he had injured his back. His testimony is not entirely clear as to whether Employee told Mr. McClellan that the injury occurred on the job.

Mr. McClellan also testified at trial. He denied that Employee told him of any on the job injury until the fall of 2006, when Employee and Mr. Fleemon came to the mortuary to look through records in an attempt to determine the date of the injury. He testified that he declined to file a workers' compensation report of injury because Employee could not tell him when and how the injury occurred.

Peggy Rouse was the administrator for Employer in 2006. She had retired in February 2007. She recalled that Employee told her that he had injured his back while moving a body. She could not recall the date of that conversation. Subsequently, on approximately August 1, 2006, she received a call from Employee's wife, advising her that "his back had gone out over the weekend at home and that he wouldn't be at work that day."

Employee testified that he sought chiropractic treatment shortly after his injury occurred. A package of medical bills was introduced into evidence at trial. These include a statement from Hamblen County Chiropractic which lists services rendered to Employee on sixteen dates between July 13, 2006 and August 21, 2006. Employee testified that these treatments provided only temporary relief. He then saw Dr. Kenneth Allum, whose speciality, if any, is not disclosed in the record. Dr. Allum ultimately referred Employee to Dr. James Killeffer, a neurosurgeon. Dr. Killeffer performed a lumbar laminectomy at the L2-3 level on November 10, 2006. He released Employee to return to work with a thirty-

pound lifting restriction on December 28, 2006. Employee returned to work for Employer until February 27, 2007, when he retired.

Employee was sixty-six years old, and had an eight grade education. He testified that he was able to read “to a certain extent.” He began working for a predecessor business of Employer in 1967. The name and ownership of the business changed several times while he was employed at the mortuary. He had also worked in a stockyard and as a sander at a woodworking business. After retiring he worked part-time for Employer’s successor and another funeral business. He testified “I have a lot of pain. Have trouble sleeping at night and I can’t get up and down the way I used to.”

The trial court found that “notice was given. I cannot . . . nobody can put a date on it as to when it was given, but I find, based on the evidence, that it was given sometime in the spring or summer of ‘06.” The court awarded 156 weeks of permanent partial disability (“PPD”) benefits (39% to the body as a whole), and ordered payment of medical expenses and temporary total disability benefits which are not disputed on appeal. Employer contends that the trial court erred by finding that Employee gave sufficient notice of his injury, and also that the award is excessive.

Standard of Review

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness’ demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Systems, Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court’s conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Notice

Employee testified that he notified his supervisor, Mr. McClellan, of his injury on the

day that it occurred. Mr. Fleemon's testimony at least partially supports Employee's description of that conversation. Mr. McClellan flatly denied that the conversation occurred. If the trial court accepted Employee's version of that event, then timely notice was given in accordance with Tenn. Code Ann. § 50-6-201(a). Given the conflicting testimony by the witnesses, a finding that timely notice was given would necessarily be based upon an assessment of credibility by the trial court and entitled to deference by the reviewing court. The trial court specifically stated as follows:

I find that based upon the testimony and, of course, I've heard from witnesses here today and I've as always been in a position to judge their credibility and, so forth, and based on the testimony, I find that notice was given.

Consequently, we find that the trial court accredited the Employee's testimony and that timely notice was given.

Also, there was no dispute that Employee and Mr. Fleemon searched through Employer's records at some time in September or October 2006 for the express purpose of attempting to determine the date that the injury occurred. Mr. McClellan agreed that this event took place, and that Employee told him at this time that he had injured his back on the job. We conclude that the trial court could have reasonably found that the statutory notice requirement was satisfied by that event.

The notice requirement in the workers' compensation statutory scheme "exists so that the employer will have the opportunity to make a timely investigation of the facts while still readily accessible, and to enable the employer to provide timely and proper treatment for the injured employee." Jones v. Sterling Last Corp., 962 S.W.2d 469, 471 (Tenn. 1998). If Employee was required to give notice, and failed to do so, a reviewing court must consider whether that failure is excusable.

In determining whether an employee has shown a reasonable excuse for failure to give such notice, courts will consider the following criteria in light of the above reasons for the rule: (1) the employer's actual knowledge of the employee's injury, (2) lack of prejudice to the employer by an excusing of the requirement, and (3) the excuse or inability of the employee to timely notify the employer.

McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. Workers' Comp. Panel 1995). In this case, Employee continued to work for several weeks or months after the injury occurred. He received limited chiropractic care and medical treatment during that time. At the time that

he and Mr. Fleemon examined Employer's records, surgery had not occurred. It is not clear that it had even been recommended at that point in time. Employer could have arranged for a medical examination at that time, but it did not do so. Under those circumstances, the trial court could have reasonably found that Employee's excuse for not giving timely notice was acceptable. Moreover, there is no evidence at all that Employer was prejudiced by the delay in receiving notice. The only witness to the injury, Mr. Fleemon, was available to Employer at all relevant times. He confirmed Employee's version of the event. Ms. Rouse, Employer's administrator, testified that she was aware, in at least a general way, that Employee had injured his back while moving a body in the course of his employment. There is no evidence in the record which even suggests that the injury was not work-related. Based upon our examination of the record, we therefore conclude that the evidence does not preponderate against the trial court's finding that Employee provided adequate notice of his work injury.

Excessive Award

Employer argues that because Employee was more than sixty years of age at the time of the injury, his percentage of permanent disability must be calculated upon two hundred sixty weeks, the maximum recovery for workers injured after their sixtieth birthday, Tenn. Code Ann. § 50-6-207(4)(A)(i), rather than four hundred weeks, the general maximum award for permanent partial disability. The award in this case, one hundred fifty-six weeks, is 60% of two hundred sixty. On that basis, Employer contends that the award amounted to the statutory maximum of six times the anatomical impairment, Tenn. Code Ann. § 50-6-241(d)(2)(A), and was not justified by the evidence.

Employer's proposed interpretation of the statute was expressly considered, and rejected, by the Supreme Court in Peace v. Easy Trucking Co., 38 S.W.3d 526, 529 (Tenn. 2001). In accordance with the holding of that case, we find that the award here was 39% permanent partial disability to the body as a whole. In light of Employee's age, limited education, and narrow work experience, we conclude that the evidence does not preponderate against the trial court's finding on the issue of disability.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellant, Mayes Mortuary, and its surety, for which execution may issue if necessary.

JON KERRY BLACKWOOD, SENIOR JUDGE